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No. 247

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In the

Supreme Court of the United States

October Term, 1963

OHIO TURNPIKE COMMISSION,
Petitioner,

v.

S. J. GROVES & SONS COMPANY,
Respondent.

BRIEF OF RESPONDENT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTE AND RULE INVOLVED	2
STATEMENT	2
REASONS FOR DISALLOWANCE OF THE WRIT	4
1. The decision of the court of appeals does not amend Rule 56 of the Federal Rules of Civil Procedure	5
2. The decision of the court of appeals is consistent with prior determinations of this court	6
3. The decision of the court of appeals is not in conflict with decisions in other federal circuits	7
4. The decision of the court of appeals is correct	7
CONCLUSION	9

TABLE OF CASES

	Page
Fox v. Johnson & Wimsatt, Inc., 127 F. 2d 729 (D.C. 1942)	7
Hollerbach v. United States, 233 U.S. 165 (1914)	3
Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)	6
Montrose Contracting Co. v. County of Westchester, 80 F. 2d 841, (2 Cir. 1936), cert. den. 298 U.S. 662	3
Nix, Inc. v. City of Columbus, 111 Ohio App. 133, 171 N.E. 2d 197 (1959)	8
Pitt Construction Co. v. City of Dayton, 237 Fed. 305 (6 Cir. 1916)	8
Poller v. Columbia Broadcasting System, et al, 368 U.S. 464 (1962)	5, 6
Salt Lake City v. Smith, 104 Fed. 457 (8 Cir. 1900)	3, 8
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944)	5, 6
United States v. Atlantic Dredging Co. et al, 253 U.S. 1 (1920)	8
United States v. Diebold, 369 U.S. 654 (1962)	5, 6, 7
United States v. Spearin, 248 U.S. 132, 136 (1918)	8

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BRIEF OF RESPONDENT

OPINIONS BELOW

The section entitled "Opinions Below" in the petition is correct.

JURISDICTION

We agree with the petitioner's jurisdictional statement.

QUESTIONS PRESENTED

The questions before the court of appeals were (1) whether the pleadings, depositions, admissions and affidavits on file showed that there was no genuine dispute as to any material fact and (2) if there was no dispute,

whether the petitioner was entitled to judgment as a matter of law. (Rule 56(c), Federal Rules of Civil Procedure).

The court of appeals answered the first question in the negative on the basis of its findings of disputes of fact, stating:

> "This case . . . involves complex facts and issues. . . . It has been strenuously contested. . . . More than the construction of the written contract is involved. The issues of defendant's breach of an implied warranty, estoppel, and accord and satisfaction must be considered in the light of the actions of the parties. *It seems that a direct factual issue is presented* . . ." (Emphasis added) (Petitioner's Appendix, p. 31).

Accordingly, the case was remanded to the district court for a full development of the facts under the usual trial procedure.

The question presented by the petition is whether the decision of the court of appeals is in conflict with the applicable decisions of this Court or of another court of appeals, or has so far departed from the accepted and usual course of proceedings in summary judgment cases as to call for an exercise of this Court's power of supervision. (Rule 19.1 (b), Revised Rules of the Supreme Court of the United States).

STATUTE AND RULE INVOLVED

The petitioner has correctly identified the statute and rule involved herein.

STATEMENT

A succinct statement of all that is material to the consideration of the questions presented appears in the opinion of the court of appeals (Petitioner's Appendix, pp. 27-29)

and will not be repeated here. We do consider it necessary, however, to point out several inaccuracies in the petitioner's statement of the case.

This case is not, as petitioner erroneously contends, (Petition, pp. 4, 5) a simple exercise in applying the terms of an unambiguous contract to an agreed set of facts. It involves complex facts and issues, many of which remain strenuously disputed and contested even after extensive discovery proceedings, as the court of appeals correctly determined. (Petitioner's Appendix, p. 31).

The principal question on the merits is whether the petitioner breached the contract by providing plans and specifications which misrepresented the work to be performed and which were insufficient to accomplish the purpose in view. The determination of this question involves a comparison of the nature and scope of the project upon which the minds of the parties met (as set forth in a multitude of technical contract documents) with the nature and scope of the work the contractor was actually required to perform. If the difference between the two is so great as to amount to a breach of contract, the contractor is entitled to recover his damages. *Hollerbach* v. *United States*, 233 U.S. 165 (1914); *Montrose Contracting Co.* v. *County of Westchester*, 80 F. 2d 841 (2 Cir. 1936), cert. den. 298 U.S. 662; *Salt Lake City* v. *Smith*, 104 Fed. 457 (8 Cir. 1900).

There is little disagreement between the parties as to the work the respondent actually performed; but there is considerable dispute as to the work contemplated, notwithstanding petitioner's incorrect statement that "the written contract of the parties contemplated the very conditions which were encountered." (Petition, p. 5). Resolution of this dispute requires an examination of the many technical contract plans and specifications through the eyes of the engineers who prepared them and the engineers who

used them in preparing the bid. The substance of respondent's position that it performed work far different from that called for by the contract is demonstrated by many facts appearing in the record in hundreds of exhibits, admissions of fact, and in affidavits contained in appellant's printed Appendix in the United States Court of Appeals for the Sixth Circuit.

Another factual dispute apparent on the face of the record and noted by the court of appeals (Petitioner's Appendix, p. 31) is whether the concrete aggregates stockpiled by the respondent and rejected by the petitioner met the specifications of the contract.

Faced with a record containing affidavits and excerpts from more than 1800 pages of contract documents, plans, specifications, correspondence, reports, depositions and the like, in a case involving not only the construction of a written contract but also the issues of breach of implied warranty, estoppel, and accord and satisfaction, and convinced that there remain to be resolved several substantial disputes of fact, the court of appeals concluded:

> "We are of the opinion that this case is one where a full inquiry into the facts under usual trial procedure is advisable to develop the facts for the purpose of clarifying the application of the law, and that it is not a case suitable for disposition through summary judgment procedure. *Knapp* v. *Kinsey*, *supra*, 249 F. (2) 797, 802-803 C.A. 6th; *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, *supra*, 303 F. (2) 425, 427 C.A. 6th; *Stevens* v. *Howard D. Johnson Co.*, *supra*, 181 F. (2) 390, 394 C.A. 4th. (Petitioner's Appendix, p. 31)

REASONS FOR DISALLOWANCE OF THE WRIT

The question presented by the petition was decided by this Court in the case of *Kennedy* v. *Silas Mason Co.*, 334

U.S. 249 (1948), wherein Mr. Justice Jackson stated (p. 256):

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

See also, *United States* v. *Diebold*, 369 U.S. 654 (1962); *Poller* v. *Columbia Broadcasting System, et al.*, 368 U.S. 464 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

The decision of the court of appeals was controlled by and is entirely consistent with the above decisions of this Court. No new law can be made by allowing the writ in this case.

1. The decision of the court of appeals does not amend Rule 56 of the Federal Rules of Civil Procedure.

The petitioner argues that, in reversing the summary judgment granted by the district court, the court of appeals engrafted certain amendments onto Rule 56 and in so doing usurped the rule-making power of the Supreme Court. This is patently untrue.

The basis of the decision of the court of appeals is simply that the record before it did not show the absence of a dispute as to any material fact. The court found a "direct factual issue" regarding the acceptability of certain concrete aggregates. The court was also of the opinion that further factual development regarding the actions of the parties was necessary to a determination of the issues of breach of implied warranty, estoppel and accord and satisfaction. (Petitioner's Appendix, p. 31) Since the record

did not satisfy the first requirement of Rule 56 (c) (that there be no genuine issue as to any material fact) it was not necessary for the court to consider the second requirement (that the moving party be entitled to a judgment as a matter of law).

Thus, far from adding any *amendments* to Rule 56, the court of appeals did not even have to apply all requirements of the rule as written in order to reach its decision. Petitioner's contention to the contrary is without merit.

2. The decision of the court of appeals is consistent with prior determinations of this Court.

We have previously cited the cases of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948); *United States* v. *Diebold*, 369 U.S. 654 (1962); *Poller* v. *Columbia Broadcasting System, et al.*, 368 U.S. 464 (1962); and *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944), as decisions of this Court which are controlling in this case. These decisions hold in substance that summary judgment should be granted only when the moving party is entitled to judgment as a matter of law, the truth is quite clear, the issues "clear-cut and simple" and no genuine issue remains for trial. In cases involving complex facts and issues, where conflicting inferences may be drawn from the underlying facts, or where some of the facts remain in dispute, summary judgment is improper. The court of appeals' decision in this case is directly in line with the above decisions. There is no conflict.

In view of the foregoing, we do not consider it necessary or proper here to undertake a case-by-case analysis of the decisions of this Court which petitioner contends are in conflict with the decision of the court of appeals. It is sufficient to say that in each of said cases the only questions involved were of law, not of fact, and therefore summary judgment was properly entered.

3. The decision of the court of appeals is not in conflict with decisions in other federal circuits.

The distinction between the instant case and the case of *Fox* v. *Johnson & Wimsatt, Inc.*, 127 F. 2d 729 (D.C. 1942), relied upon by the petitioner, appears from the portion of the opinion immediately following that quoted by petitioner (at p. 737):

> "The Court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile. Judgment therefore was given properly for the defendant."

In the instant case, by contrast, the court of appeals found that a trial is necessary to permit a further development of the facts and to resolve disputed facts. In *United States* v. *Diebold*, 369 U.S. 654 (1962), this Court reversed a summary judgment to resolve conflicting inferences from underlying facts, a situation much like this case.

The other cases cited by petitioner are distinguishable on similar grounds. In each case the court of appeals was satisfied that the test of Rule 56 had been met, namely that the record showed there was no dispute as to any material fact.

4. The decision of the court of appeals is correct.

The petitioner's final contention appears to be that the contract on its face precludes the respondent from any recovery *regardless of what the facts may be* and, therefore, that the summary judgment should have been affirmed *even though the record may have shown disputes of fact*. This contention merits only the briefest response.

Under the substantive law applicable to this case, contract clauses of the type quoted by the petitioner will not bar recovery if the respondent succeeds in proving the

alleged breach of contract. *United States* v. *Spearin*, 248 U.S. 132, 136 (1918); *Salt Lake City* v. *Smith*, 104 Fed. 457 (8 Cir. 1900); *Nix, Inc.* v. *City of Columbus*, 111 Ohio App. 133, 171 N.E. 2d 197 (1959); *Pitt Construction Co.* v. *City of Dayton*, 237 Fed. 305 (6 Cir. 1916).

In *United States* v. *Atlantic Dredging Co., et al*, 253 U.S. 1 (1920), this Court cited several prior decisions stating the rule that contractors ought to be relieved from clauses requiring them to visit the site and inform themselves of the actual conditions when they are misled by erroneous statements in the specifications and applied the rule to facts similar to those of the instant case. Therefore, the decision of the court of appeals on this point is not erroneous.

A complete presentation of the facts is all important to the determination of this litigation. Since there are disputed facts, the court of appeals quite properly remanded the case for a trial in the usual manner.

CONCLUSION

The court of appeals correctly held that the summary judgment entered by the district court in favor of the petitioner was erroneous. Because of the complexity of the facts and issues involved, the existence of disputed questions of fact and the need for additional evidence and fact findings, this is clearly not a case suitable for disposition through summary judgment procedure.

The petitioner has failed to show "special and important reasons" for the allowance of its petition, or that the case is of interest to the public, as distinguished from the particular parties here involved. Therefore, the petition should be denied.

Respectfully submitted,

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